No. 85-1517

In The
Supreme Court of the United States
October Term, 1986

STATE OF COLORADO,
Petitioner,

v.

JOHN LEROY SPRING,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT BY THE COLORADO CRIMINAL DEFENSE BAR, INC.

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QUESTION PRESENTED

Whether the Colorado Supreme Court correctly applied the totality of the circumstances standard in determining that the Prosecution had not met its burden to establish a valid *Miranda* waiver.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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—o—

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—o—

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I.

INTRODUCTION

Defendant-Respondent was the defendant in the trial court and will be referred to by name or as "Defendant."

Petitioner will be referred to as the "Prosecution" or the "State." A recitation of the pertinent facts has been adequately set forth by the Respondent and is here adopted. References to the record will be to the Joint Appendix ("J.A.") filed with this Court.

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II.

INTEREST OF THE COLORADO CRIMINAL DEFENSE BAR

The issue in this case is whether the Colorado Supreme Court correctly applied the applicable law in determining that under the totality of the circumstances the Prosecution had not met its burden of proof that Mr. Spring had validly waived his rights prior to interrogation. The Court's resolution of whether the Colorado Court applied the correct legal standard is likely to have a significant effect on the procedure utilized by law enforcement officers for questioning criminal suspects as well as on the resolution of suppression issues by the courts.

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III.

SUMMARY OF THE ARGUMENT

The prosecution in a criminal case may not introduce statements elicited from a defendant during custodial interrogation unless it demonstrates that the defendant was adequately warned of his *Miranda* rights and thereafter

voluntarily waived those rights with an understanding of the nature and consequences of the waiver. In evaluating whether the prosecution has met its burden to show a valid waiver, the court must scrutinize the particular facts and circumstances of each case and base its decision on the totality of the circumstances. One of the circumstances that the court should consider is the defendant's knowledge of the nature of the investigation about which he is being interrogated. The court may consider the nature of the advisal, defendant's actual knowledge of the investigation and, if applicable, the agents' deception or withholding of information concerning the nature of the investigation.

Petitioner and the United States have mischaracterized the holding below as adopting a *per se* rule that suspects must be advised of all possible subjects of interrogation prior to custodial interrogation. To the contrary, the Colorado Supreme Court correctly applied the totality of the circumstances standard when it evaluated Defendant's March 30, 1979 statement to Federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents. The Colorado Court's conclusion that Mr. Spring was not adequately advised of the nature of the inquiry and that, therefore, his March 30th statements about the Colorado homicide must be suppressed, is supported by the law and the evidence in this case and should be upheld.

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IV.

ARGUMENT

THE COLORADO SUPREME COURT UTILIZED THE CORRECT LEGAL STANDARD IN DETERMINING THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES THE PROSECUTION HAD NOT MET ITS BURDEN TO ESTABLISH A VALID MIRANDA WAIVER BY DEFENDANT

The Fifth Amendment of the United States Constitution prohibits use by the prosecution of statements elicited during custodial interrogation of a defendant unless the prosecution demonstrates that the defendant was adequately warned of his privilege against self-incrimination and his right to counsel and thereafter waived those rights. *Miranda v. Arizona,* 384 U.S. 436 (1966). The requirement that suspects be advised of their *Miranda* rights prior to interrogation is based on this Court's recognition of the inherent compulsion and compelling pressures exerted upon individuals subject to custodial interrogation. *Moran v. Burbine,* 106 S.Ct. 1135, 1141 (1986). Any waiver of these rights must be knowing, intelligent and voluntary, and must be made with an understanding of the consequences of the waiver. "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Miranda v. Arizona, supra,* 384 U.S. at 469.

The validity of a suspect's waiver of *Miranda* rights must be evaluated on the basis of "the totality of the circumstances surrounding the interrogation. . . ." *Fare v. Michael C.,* 442 U.S. 707, 725 (1979) citing *Miranda v. Arizona, supra* at 475-77; *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979). *See Schneckloth v. Bustamonte,* 412

U.S. 218, 226 (1973). In *Johnson v. Zerbst,* 304 U.S. 458 (1938) this Court determined that the validity of a waiver depends upon "the particular facts and circumstances surrounding that case including the background, experience and conduct of the accused." 304 U.S. at 464. This Court recently reaffirmed application of the totality of the circumstances test to evaluate the validity of a *Miranda* waiver.

> The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (citations omitted)

Moran v. Burbine, supra at 1141.

One of the factors which should be considered by the courts in applying this standard is whether, and to what extent, a suspect is aware of the subject matter under investigation prior to his interrogation. *See Carter v. Garrison,* 656 F.2d 68, 70 (4th Cir. 1981) (per curiam); *United States v. McCrary,* 643 F.2d 323, 328-29 (5th Cir. 1981); *United States ex rel. Henne v. Fike,* 563 F.2d 809, 813-14 (7th Cir. 1977); *Collins v. Brierly,* 492 F.2d 735, 738-40 (3rd Cir. 1974) (en banc), *cert. denied,* 419 U.S. 877 (1974). *See also,* 18 U.S.C. 3501(b) (in determining voluntariness of confession, judge shall consider among other factors whether the defendant knew the nature of the offense).

Petitioner has framed the issue before this Court in a misleading fashion. Contrary to the argument made by Petitioner in its opening brief, the Colorado Supreme Court did not conclude that, prior to interrogation, a suspect must be advised of all the possible subjects of interrogation or that a subject must be advised of the exact nature of the charge for which he is a suspect.[1] Instead, the Court applied the totality of the circumstances test and specifically held that whether the suspect is informed of the subject matter of the interrogation is not determinative of the validity of his *Miranda* waiver.

> We believe it to be more consistent with standards governing the validity of a waiver to consider the extent of the suspect's understanding of the subject matter, and the source of that understanding, simply as factors in the totality of circumstances surrounding the making of a statement. We decline to elevate those considerations into an absolute rule that renders any waiver automatically invalid when the interrogated suspect has not been informed of the subject matter of the questioning prior to its commencement.

People v. Spring, 713 P.2d 865, 873-74 (Colo. 1985). The Colorado Supreme Court's rejection in *Spring* of a *per se* rule and adoption of the totality of the circumstances test is evidenced by its opinions in subsequent decisions. In *Jones v. People*, 711 P.2d 1270 (Colo. 1986) the court refused to suppress statements on the ground that the defendant had not been advised of, and was unaware of, the

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[1] The United States in its amicus brief likewise misrepresents the holding below by stating "[t]he Colorado Supreme Court concluded that Respondent's waiver nonetheless was ineffective because he was not informed in advance *of all the subjects that would be covered in the proposed interrogation.*" Brief of the United States at 13. (emphasis added)

nature of the investigation at the time of his *Miranda* waiver and interrogation. The court recently reaffirmed its adherence to the totality of the circumstances standard in *People v. Longoria*, 717 P.2d 497 (Colo. 1986) and *People v. Chase*, 719 P.2d 718 (Colo. 1986) stating that "the validity of a waiver must be based on the totality of the circumstances surrounding the making of the statement" and that "no one factor is determinative, but each one is important and should be appropriately considered." *Id.* at 721. Thus, the Petitioner's framing of the issue and its argument to this Court are based on an erroneous interpretation of the basis for the Colorado Supreme Court's decision in *People v. Spring, supra.*

The State bears a heavy burden to show a valid waiver of *Miranda* rights by a defendant and the courts should " 'indulge every reasonable presumption against waiver.' " *Johnson v. Zerbst, supra* at 464 *quoting Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937). The courts will not " 'presume acquiescence in the loss of fundamental rights,' " *Johnson v. Zerbst, supra*, 304 U.S. at 464 *quoting Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 and "[s]ince the state is responsible for establishing the isolated circumstances under which the interrogation takes place . . . the burden is rightly on its shoulders." *Miranda v. Arizona, supra*, 384 U.S. at 475.

As *Miranda* and its progeny make clear, any evidence that a defendant was tricked or misled about the facts and circumstances surrounding the interrogation or about the consequences of his waiver will demonstrate that he did not voluntarily waive his privilege against self-incrimination. *Moran v. Burbine*, 106 S.Ct. 1135, 1158 (Stevens, J. dis-

senting); *Miranda v. Arizona, supra,* 384 U.S. at 476. *See Police Trickery in Inducing Confessions,* 127 U.Pa. L. Rev. 581 (Jan. 1979).

In the case at bar, it is undisputed that the federal ATF agents who arrested Defendant on March 30, 1979, were aware of his alleged involvement in the Colorado homicide at the time of the arrest and, moreover, they considered Mr. Spring to be a suspect in that murder. Mr. Spring was arrested in Kansas during a sale of stolen firearms to undercover agents specializing in the detection of such crimes. Although his arrest and advisement related solely to the firearms' charges, the federal agents specifically and deliberately questioned Mr. Spring about the Colorado homicide without informing him that he was a suspect. Agent Patterson's manner of broaching the Colorado murder during the March 30th interview was a deliberate attempt to take Mr. Spring by surprise and elicit incriminating statements about the Colorado case. After questioning him generally about the weapons charge, Agent Patterson asked Mr. Spring about his involvement as a juvenile in the shooting of his aunt and then asked him if he had ever shot anyone else. (J.A., pp.49-50) The agent then proceeded to question Mr. Spring further about the Colorado homicide. (J.A., p.50)

The federal agents' failure to advise Mr. Spring that he was a suspect in the Colorado homicide was aggravated by several factors which the Colorado Supreme Court considered in its decision. The agents conducting the interrogation were specialized federal officers who would not normally be involved in a homicide investigation from a distant state jurisdiction. They had arrested Mr. Spring the same day for unrelated and, relatively, less serious

criminal activity. The record reveals a lack of any basis from which to conclude that Mr. Spring, at the time he waived his *Miranda* rights, reasonably could have expected that as a consequence of his waiver, he would be interrogated about a Colorado homicide. *Compare Carter v. Garrison, supra,* (waiver upheld where defendant was advised that investigation involved a possible break-in and was later questioned about a homicide; burglary and homicide involved the same criminal episode at the same location and defendant was informed of the homicide twenty minutes before he made incriminating statements); *Jones v. People, supra,* (failure of police to advise defendant he was a suspect in a homicide did not invalidate waiver where defendant was advised concerning motor vehicle theft and the vehicle at issue was stolen from the homicide victim as part of the same criminal episode).

Under the particular facts and circumstances of this case, the Colorado Supreme Court correctly found that Mr. Spring did not voluntarily waive his Fifth Amendment privilege with regard to the murder charge and that he was not properly advised of the consequences of his waiver.

> It is indisputed that a waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently and voluntarily in order to be effective . . . . (cites omitted) It is difficult to discern how a waiver of these rights could be knowing, intelligent and voluntary where the suspect is totally unaware of the offense upon which the questioning is based.
>
> A valid waiver of constitutional rights does not occur in a vacuum. A waiver of the right to counsel and right to remain silent occurs in response to a particular set of facts involving a particular offense. The *Miranda* warnings are given not solely to make the

suspect aware of the privilege, but also the consequences of foregoing the privilege.

United States v. McCrary, 643 F.2d 323, 328-29 (5th Cir. 1981); *see also Schenk v. Ellsworth,* 293 F.Supp.26 (D. Mont. 1968), where the court held that the defendant could not exercise a knowing and voluntary waiver of his *Miranda* rights where he was not told that he was a suspect in his wife's murder.

In *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866 (1981) this Court held that prior to an in-custody court ordered psychiatric competency examination, an accused must be advised of his *Miranda* rights "and the possible use of his statements," namely their possible use in the penalty phase of the capital trial — before the statements can be admitted as evidence at the penalty phase. While the Court did not specify the exact warning which must be given, it is clear that advisement of *Miranda* rights alone is not sufficient to insure a valid waiver where the context of the advisement does not support the conclusion that the suspect understood the consequences of the waiver. This focus on whether a defendant is aware of the consequences of his waiver necessitates preservation of the totality of the circumstances standard and rejection of the *per se* rule urged by the Prosecution.

Contrary to the Government's argument, this Court's decisions in *Moran v. Burbine, supra,* and *Oregon v. Elsted,* — U.S. —, 105 S.Ct. 1285 (1985) do not require rejection of the totality of the circumstances standard or limit the obligation of law enforcement officers to a simple recitation of *Miranda* rights. To the contrary, this Court explicitly reaffirmed its previous holdings that the prosecu-

tion must prove a voluntary waiver made with a full awareness and understanding of the consequences of that waiver prior to the admission of a defendant's statements at trial. *Moran v. Burbine, supra,* 106 S.Ct. at 1141. The Colorado Supreme Court's conclusion that the Prosecution failed in its burden to show that Defendant understood the nature and consequences of his waiver on March 30, 1979, is amply supported by the evidence and should be affirmed.

In its amicus brief, the United States argues that the Colorado Supreme Court's decision in *Spring* would place an undue burden on police officers by requiring them to inform suspects of the general nature of the investigation and would undermine the principle advantage of the *Miranda* rule — its simplicity and clarity of application. This argument ignores the plain meaning of *People v. Spring, supra,* wherein the Colorado Supreme Court follows traditional federal interpretation of the *Miranda* rule and applies a totality of the circumstances test. Analyzing the Government's argument in the context of this case, it is clear that on March 30, 1979, the federal ATF agents were equally aware that Mr. Spring was a suspect for firearms violations and for a homicide in Colorado. With equal ease they could have advised Mr. Spring that he was a suspect in either or both offenses. Instead, they elected to only advise him concerning the firearms investigation but to interrogate him about both crimes. *See Moran v. Burbine, supra* (Stevens, J. dissenting), 106 S.Ct. at 162-63 n.48. Adoption of the *per se* rule advocated by the Prosecution would condone the use of *Miranda* by law enforcement agents to trick an unsuspecting defendant concerning the nature of the investigation. This is particularly offensive in light of the origin of the required advisal which

is based on this Court's recognition of the inherent compulsion and pressures of custodial interrogation. *Moran v. Burbine, supra; Miranda v. Arizona, supra.*[2]

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V.

CONCLUSION

A valid waiver of *Miranda* rights requires proof by the prosecution that defendant acted with full understanding of the nature of the rights being waived and the consequences of the waiver. The Colorado Supreme Court correctly analyzed Defendant's waiver in light of the totality of the circumstances and the particular facts and circumstances of this case including the investigating agents' deliberate decision not to advise Mr. Spring that he was a suspect in a homicide. Contrary to the State's assertions, the Colorado Court did not adopt a *per se* rule that suspects must uniformly be advised of the specific nature of the investigation prior to interrogation. Therefore, the judgment of the Supreme Court of Colorado should be affirmed.

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[2] In *Moran v. Burbine, supra,* the majority of this Court carefully distinguished deceptive police activities aimed at a defendant's attorney as opposed to direct deception of the defendant. Although the distinction was rejected by three members of this Court, *see Moran v. Burbine, supra,* 106 S.Ct. at 1162-64 (Stevens, J. dissenting), it is inapposite in this case because the agents withheld information about the homicide investigation directly from Mr. Spring.

Dated this 17th day of September, 1986.

Respectfully submitted,

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